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No. 99

In the Supreme Court of the United States

OCTOBER TERM, 1962

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BOSTON AND MAINE RAILROAD ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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1. The appellees' briefs tend to confuse the underlying issue of this case. That issue is not merely whether the appellee railroads have a right to reduce their rates on export-import traffic to better compete with the appellant railroads serving the southern tier ports, but whether the Interstate Commerce Commission is required as a matter of law to enforce rate parity with the appellee railroads upon the railroads serving the southern tier ports. The reduced rate proposals of the northern carriers were met by matching rate reductions proposed by the southern lines to maintain the existing rate differentials at a lower rate level. Before the Commission,

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all of the parties were agreed that the issue was one of rate *relationships* rather than rate *levels*. The court below understood the real nature of the controversy, as shown by the reference in its judgment to "differential-eliminating rates."

In this Court, the brief of the New York Central and other railroads serving New York states (at pp. 10-11) that:

> "The validity of the Commission's order cancelling the retaliatory rate proposals of the Appellant railroads was not put in issue before the District Court. Appellants did not appeal the Commission's finding that their proposed rates were not just and reasonable. Therefore the District Court did not deal with them and they are not in issue in this appeal."

This is followed by the suggestion (at p. 48) (heavily qualified by a footnote) that "There is nothing in the decision of the District Court depriving Appellant railroads of freedom to propose reductions of their own rates * * *."

The Commission's finding that the countervailing reduced rates proposed by the southern carriers "are not shown to be just and reasonable" merely recognized the conditional nature of those rate reductions. As the Boston appellees accurately state in their brief (p. 5), "These differential-restoring rates were intended to take effect *only* if the simultaneously published parity rates were permitted to stand." The Commission made no finding that the countervailing reduced rates proposed by the southern carriers would be non-compensatory or otherwise unlawful in any

particular respect. There is, therefore, no basis for a suggestion that the reduced rates proposed by the southern carriers have already been prescribed as unlawful, and that the issue is no longer one of rate *relationships*.

The true nature of the case is revealed in the brief of the Boston appellees in which, after asserting an unlimited right in the northern carriers to make competitive rate reductions, they urge that "Any differential-restoring rates which the southern tier carriers might publish therefore would be lower than needed to be competitive with the proposed rates of the Boston carriers" (at p. 58), and therefore unlawful.[1] This amounts to saying that the issue is whether enforced parity is required as a matter of law.[2]

2. The flat position of the Boston appellees (Br. pp. 58-59) (and the guarded suggestion of the New York appellees, Br. p. 48, fn.) that the southern carriers as a matter of law may not be permitted to lower their rates to respond to the competitive effect of rate re-

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[1] Indeed, this was the position of all of the appellees (except the United States) in their Motion to Affirm filed with this Court (at p. 23):

> "It is fundamental that if the appellee railroads lawfully reduce their rates to a basis of equality with the rates of the appellant railroads as a matter of necessity in order to meet competition, then a retaliatory reduction by appellants must be condemned as unnecessary to meet competition."

[2] Also, since the northern carriers do not challenge the Commission's findings as to the lower costs of the southern carriers, it amounts to a claim of "umbrella" rate protection such as some of the appellee carriers recently decried in *Interstate Commerce Commission et al.* v. *New York, N. H. & H. R. Co. et al.*, Nos. 108, 109, 110 and 125, argued before this Court in February 1963.

ductions by the northern carriers, coupled with Boston's view that its position does not stand or fall with that of New York, could have some dramatic consequences. It could mean that if the carriers serving Boston must be and are permitted to reduce their rates to the Baltimore level, they would have lower rates than the carriers serving New York and Philadelphia, and the latter, together with the carriers serving Baltimore, may not publish reduced rates which would be lower than necessary to be competitive with the rates of the Boston carriers. ("competitive" presumably meaning to "allocate" a substantially increased share of export-import traffic to Boston and the carriers which serve it.)

3. The appellees misread both history and law in contending that distance has been "almost universally" disregarded in determining the rate relationships between carriers serving different ports (New York appellees' brief p. 17). It is true that there has been a substantial disregard of distance—as there has been in the North Atlantic differentials as to which distance and cost differences of the southern carriers, if not qualified, would warrant larger differentials (R. 3805). It was taken into account when the Commission prescribed differentials between Galveston and New Orleans which gave some recognition to the distance advantages of the former. The appellees' position that advantages of distance and cost must be wholly ignored in favor of the "competition" of enforced parity rates would mean that the Pennsylvania Railroad, which serves New York only via Philadelphia, must be required to

charge the same rate for hauling export-import traffic an additional 86 miles to and from New York, as it does to and from Philadelphia.

The true significance of the 1935 amendment to Section 3(1), read in the context of this Court's decision in *Texas & Pacific R. Co.* v. *United States*, 289 U.S. 627 (1933) which evoked it, is that it totally rejects the appellees' basic argument and the primary basis of the decision below. It is a rejection of the view that carriers serving a port have an unlimited right to reduce rates in competition for export-import traffic with carriers serving other ports without regard to any other consideration. It is an express affirmance of the position of the Commission and of four members of this Court in the *Texas & Pacific* case that ports, as such, have interests which may be subjected to undue preference and prejudice by the rate relationships between the carriers serving the respective ports, and that such discrimination can be "produced by charging equal rates for unequal service." (289 U.S. at 656). Finally, it is a recognition that the Commission may deal with these problems, as it did in the *Galveston* case and in the present case, by taking into account the distance and cost advantages and disadvantages of the carriers serving competing ports. The clear purposes of the 1935 amendment cannot be dissipated by generalizations from the Fink and Cooley arbitration reports (or from reports of the Commission).

4. In this Court, and for the first time, the Department of Justice urges that before the Commission could deal with the relationship between rates of the

carriers serving the northern and southern tier ports, respectively, "the Commission should have evaluated, as to each of the ports—northern and southern—data as to fully distributed costs. Similarly, it would seem that the Commission might appropriately make findings as to whether the proposed reductions would increase the traffic carried by the northern roads so as to reduce their line-haul unit costs below the 1955 average and their port terminal costs below those of September 1956 and what effect the reductions would have on the per-unit costs of carriage by the southern roads." (D. of J. br. 33).

(6) None of the appellees other than the Department of Justice is now challenging the Commission's finding that the carriers serving the southern tier ports have advantages of *distance and cost* over the carriers serving the northern tier ports. We submit that the Department of Justice should not be permitted to do so for the first time at this late date. The various parties to the proceeding before the Commission were entitled to develop their cases along the lines which they considered proper. Thus, the appellee railroads specifically declined to produce the detailed evidence as to their costs of serving the northern tier ports which the Department belatedly finds to be indispensable. The appellant carriers serving the southern tier ports produced extensive evidence as to their costs of serving those ports and New York. The Commission's conclusion as to relative costs, unchallenged here by the appellee railroads, was based

upon this cost evidence. Certainly under these circumstances questions as to the quantum and quality of the cost evidence—the conclusions that could be validly drawn from it—are for the Commission to determine. *New York* v. *United States*, 331 U.S. 284, 328 (1947).

It is also important that even cases such as this should be determined by the Commission within a reasonable time and without imposing upon the parties expensive and time-consuming evidentiary burdens as to matters which they do not choose to put in issue.

(b) If the Department had recognized that the issue is one of rate relationships—whether the Commission was required to impose rate parity upon the railroads serving the North Atlantic ports, it would have further recognized that under its proposed evidentiary requirements the appellee carriers serving the northern tier ports have wholly failed to meet their burden of proof under Section 15(7) of the Act as to the lawfulness of their proposed rate reductions. Recognizing this, the New York appellees (Br. p. 68) attack the Department's approach on the ground that costs are wholly irrelevant.

(c) In another suggestion made for the first time in this Court, the Department proposes (Br. p. 43) that upon a remand:

> * * * the Commission should be directed to make findings as to whether each of the northern carriers which filed reduced rates serves the various southern tier ports direct from the

differential territory or through joint rates covering such service. This finding is a prerequisite to the Commission's jurisdiction under Section 3(1) which applies only where a carrier gives an undue preference between ports which it serves. *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627; *New York* v. *United States*, 331 U.S. 284; *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573. We do not suggest that such jurisdictional facts are lacking here; but, since neither the Commission nor the parties appear to have considered this question, it appears appropriate that the facts should be determined and set forth in the Commission's report.

Again, we fail to see why issues should be raised as to matters which the parties involved, presumably informed, are willing to take for granted. It should be noted that the identical question was raised by the three-judge court *sua sponte* in *New York Central R. Co.* v. *United States*, 207 F. Supp. 483 (S.D.N.Y., 1962), with respect to import rates on iron ore. That court stated in its opinion that "However, inquiry elicited that the New York Central and the Erie are parties to joint rates between Baltimore and differential territory" (id. at p. 489). What was there found to be the fact with respect to a single commodity is presumably true as to at least many of the countless commodities involved in this proceeding.

It is fair to assume that this is why none of the appellee railroads has raised such an issue.

Respectfully submitted.

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